FILE COPY

Supreme Court, U. S.
FILED
DEC 9 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1497

LORETTA FAY BECK, *Petitioner*

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

To The United States Court of Appeals
For The Fifth Circuit

Respondent's Reply to Petition for Rehearing of Writ of Certiorari

---

THOS. H. LAW
Attorney for Respondent

Of Counsel:
LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1497

LORETTA FAY BECK, *Petitioner*

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

To The United States Court of Appeals
For The Fifth Circuit

Respondent's Reply to Petition for Rehearing of Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

In her Petition for Writ of Certiorari, Petitioner cited *The Minnesota Mutual Insurance Co. v. Morse*, 476 S.W.2d 753 (Tex.Civ.App., Texarkana, 1972), and *Republic Ins. Co. v. Silverton Elevators, Inc.*, 477 S.W.2d 336 (Tex.Civ. App., Amarillo, 1972), and called attention to the fact that application for writ of error was pending before the Texas Supreme Court in each case. (Petition for Certiorari, pp. 10-11.) Thereafter she filed a Reply Brief, again calling attention to these cases and pointing out that applications for writ of error had been granted. (Reply Br., pp. 1-2.)

After this Court overruled the Petition for Certi-

orari, Petitioner filed a Petition for Rehearing. It contained nothing new, merely telling this Court for the third time that *Minnesota Mutual* and *Republic Ins.* were pending before the Texas Supreme Court.

Respondent did not believe that any useful purpose would be served by filing a reply to Petitioner's briefs, which did no more than repeat her previous arguments. However, now that the Texas Supreme Court has decided *Minnesota Mutual* adversely to her contentions (exactly as both Respondent and the Fifth Circuit had in effect predicted), Petitioner has filed an "Addendum to Petition for Rehearing" and has assured this Court that black somehow is really white: that the Texas Supreme Court's reversal of the Court of Civil Appeals so as to deny recovery under the policy (because waiver and estoppel do not apply in life insurance cases), proves that waiver and estoppel *do* apply and that Petitioner should recover under the policy.

Petitioner assures this Court that "The judgment of the Court of Civil Appeals was reversed [by the Texas Supreme Court] because the facts necessary to invoke waiver and estoppel were missing." She does not say what these supposed "facts" were, nor can she. For they do not exist. This Court will, of course, observe from the opinion of the Texas Supreme Court that the beneficiary sought recovery under two group life policies. Both the insured retiree and the credit union considered the insured to be a member of the credit union until his death, and premiums were paid to and accepted by the insurer on the life of the insured until his death. In addition (and going beyond the factual

situation in our case, where the insured died approximately one month and nine days following delivery of the policy), the policy had been in effect for several years so that the incontestability clause was invoked. Nevertheless, under the well established law in Texas the Supreme Court denied recovery, stating that waiver and estoppel "cannot be used to create a new and different contract with respect to the risk covered and the insurance extended":

> "The court of civil appeals held that by acceptance of the premiums computed on the full balances of these accounts of James K. Morse up to the date of his death, Minnesota Mutual has waived any defense relative to the disability of Morse and is now estopped to deny coverage to the full extent of the balances as of the death of Morse. Whereas waiver and estoppel may operate to avoid forfeiture of a policy and may prevent an insurance company from avoiding payment because of the failure on the part of the insured to comply with some requirement of the policy, waiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended. Great American Ins. Co. v. Mitchell, 335 S.W.2d 707 (Tex.Civ. App. 1960, writ ref'd)." 16 Tex. S.Ct. Journal 85.

Respondent relied on and cited *Great American Ins. Co. v. Mitchell* both in the Fifth Circuit briefs (Appellant's Br. in Fifth Circuit, pp. 12-13, 16; Appellant's Reply Br., p. 12) and in its Reply to Petition for Certiorari in this Court (pp. 8-9), pointing out that the Texas Supreme Court had expressly placed its stamp of approval on the *Mitchell* holding that:

> "Waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. In other words, waiver and estoppel can not create a new and different contract with respect to risks covered by the policy." (Reply Br., p. 9.)

The Fifth Circuit also expressly recognized this statement of the Texas law by citing *Mitchell* in *Travelers Indemnity Company v. Holman*, 330 F.2d 142, 144 (5th Cir., 1964). The Texas Supreme Court now once again, in *Minnesota Mutual*, has cited and expressly approved *Mitchell*.

The point, which somehow continues to escape Petitioner, is that good health was a condition precedent to coverage in the instant case. Because (as found by the jury) this condition precedent was not fulfilled, no contract ever became effective between Mr. Beck and Connecticut General. And where a contract never came into existence between the parties, the Texas courts will not allow estoppel or waiver to create such a contract. This, once again, is the holding of the Texas Supreme Court in *Minnesota Mutual*. "Waiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended."

The other case cited by Petitioner in her Petition for Writ of Certiorari, her Reply, and her Petition for Rehearing is *Republic Ins. Co. v. Silverton Elevators, Inc.*, 477 S.W.2d 336 (Tex.Civ.App., Amarillo, 1972). This case has not yet been decided by the Tex-

as Supreme Court buregardless of the eventual holding, it is not pertine to the instant case. *Republic Ins.* does not involve life insurance policy but property and fire insuran, the rules for which are quite different, as set fortht pages 10 and 11 of Respondent's Reply to Petitiofor Writ of Certiorari.

Finally, Petitionersserts that "it is fraud to permit an insurance conany knowingly to sell a worthless policy . . . a layan will likely question the integrity of the Court'if the Fifth Circuit opinion in this case is not set ade. (Petition for Rehearing, p. 5.) The truth of thenatter is, as heretofore pointed out in this Responde:'s Fifth Circuit briefs and its Reply in this Court, iat

(1) There wano "fraud" whatsoever on the part of Connectiut General. The hypothesis on which Petitionr's entire argument is based (knowledge by onnecticut General of the insured's illness) ; supported by neither a jury finding nor the evdence. (Respondent's Reply, pp. 2-3, 4-6.)

(2) The policyspecifically provided that no insurance would tke effect unless the policy had been manually dlivered during the good health of the proposed inured. This provision was spelled out twice — in te body of the policy itself and then repeated inPart I of the Application, the latter specificallybeing made a part of the policy and being signedby the proposed insured. (R., p. 22.)

(3) It was unontroverted that the insured was not in good healh at the time the policy was delivered. The juryso found (R., pp. 526, 527) and

the Petitioner must and does so admit. (Petition for Certiorari, p. 3.)

(4) Mr. Beck fraudulently made application for an insurance policy claiming good health and concealing his vascular problems, discoloration and numbness of both the left arm and the right foot, long history of serious illness and hospitalizations. Approximately one month and nine days after delivery of the policy, he suffered a coronary occlusion which resulted in his immediate death.

Under the plain terms of the policy, it never took effect because the proposed insured was not in good health at the time of the delivery. "Waiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended." *Minnesota Mutual, supra.*

WHEREFORE, Connecticut General Life Insurance Company respectfully prays that the Petition for Rehearing of the Petition for Writ of Certiorari be denied.

THOS. H. LAW
Attorney for Respondent

Thos. H. Law

Of Counsel:
LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102

CERTIFICATE OF MAILING

I, Thos. H. Law, attorney of record for Respondent, do hereby certify that the foregoing Reply has been served upon Petitioner, Loretta Fay Beck, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to her attorney of record, Mr. Bill Atkins, P. O. Box 248, 407 Arlington Bank & Trust Building, Arlington, Texas 76010, on this 6 day of December, 1972.

Thos. H. Law